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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 901

Case No. 979: ABU SALEM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 17 February 1997, Husein Abu Salem, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting:

"a) The Report of the recommendation of [the] Survey Team to DAHR [Department of Administration and Human Resources] on the survey which was conducted in May 1994.

b) Salary increase of 30% across the board to be implemented retroactively from 1st of May 1994 to match [the] effective date of the comparator['s] increase."

Whereas the Respondent filed his answer on 29 October 1997;

Whereas the Respondent submitted, as annex 4 to his answer, the Report requested in the Applicant's first plea;

Whereas the Applicant filed written observations on 25 January 1998, in which he revised his pleas as follows:

> "1) The 12% which were increased for grades 1-13 effective 1 Oct. 1994 [should] be applied across the board (including grades 14-20) retroactively, effective 1 May 1994.
>
> 2) The 15% that were increased across the board on 1 January 1996 [should] be applied to match the effective date of the comparator's increase which is 1 May 1994."

Whereas the Applicant filed an additional document on 8 February 1998, attaching a list of signatures of staff members on whose behalf the Applicant filed his application;

Whereas, on 19 March 1998, the Respondent filed an additional document;

Whereas, on 22 April 1998, the Applicant filed an additional document;

Whereas, on 21 June 1998, the Respondent filed an additional document;

Whereas, on 3 August 1998, the Tribunal decided to adjourn consideration of the case until its next session, to be held in New York starting 20 October 1998;

Whereas, on 14 August 1998, the Tribunal put questions to the Respondent, to which he provided answers on 1 October 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 23 September 1959, on a temporary indefinite appointment as an area staff member, in the post of Teacher, at the grade 5 level. He has served continuously thereafter in different capacities and, since 24 January 1993, has occupied the post of Principal, Damascus Training Centre, Syrian Arab Republic (SAR), at the grade 16 level. In his capacity as Chair of the Area Staff Union, SAR, he filed the present application on behalf of himself and other UNRWA area staff members in SAR.

During the period of 11-16 May 1994, members of the Compensation and Management Services Division of the Department of Administration and Human Resources (DAHR), UNRWA, Vienna, visited Damascus to investigate the conditions of service for the Agency's area staff members in SAR. On 25 May 1994, the group issued a report of its survey, recommending, inter alia, "an increase of 25% to the base salaries of area staff in the Syrian Arab Republic to maintain a reasonable relationship with the comparator ..." and noting that the cost of such increase to the Agency would be approximately US$3.2 million per annum. On 27 June 1994, the Director, DAHR, advised the Chairman, Administration and Management Committee (AMC), of the findings of the survey and recommended committing either US$10 million or $12 million to effect a salary increase for area staff throughout UNRWA. On 6 July 1994, the Acting Chairman, AMC, advised the Commissioner-General that there were insufficient funds to cover either recommendation. Thus AMC proposed that the Commissioner-General identify, without thereby committing, $10 million to plan the framework for possible salary increases; linking the 1994 salary increases to cuts in expenditures; and increasing SAR area staff salaries by 18 per cent with effect from 1 May 1994, 20 per cent with effect from 1 July 1994, and 25 per cent with effect from 1 October 1994.

On 13 September 1994, the Commissioner-General announced in Transmittal Memorandum No. 58 (Cod.A/59/Rev.25/Amend.50), to all staff subject to the Area Staff Regulations and Rules that:

> "Following the survey of Area Staff salaries and benefits in relation to the comparator's salaries and benefits and taking into account the large deficit in the current budget biennium and the ongoing austerity measures, Area Staff salaries in the Syrian Arab Republic at grade 01 through grade 13 and grade 14 through grade 20 will be increased by 12.0% and 5.0% respectively, effective 1 October 1994."

On 19 September 1994, the Area Staff Union, Executive Committee (ASUEC) wrote to the Commissioner-General expressing "surprise" and "frustration" at the "meager

increase", and requesting him to reconsider the increase and take corrective action. On 20 September 1994, the Director, DAHR, responded on the Commissioner-General's behalf to the Chairman, Area Staff Union, explaining that "there were not sufficient funds available even for the salary increases that were granted" and that "the Commissioner-General had to impose $7.5 million worth of budget cuts on Agency activities in order to be able to meet staff costs including the salary increases that were recently announced ..." He noted that "with the announced increases, the level of Area staff salaries in SAR will continue to compare quite favourably with that of the comparator." After further exchange of correspondence, on 6 November 1994, the Applicant, in his capacity as Chairman of the Area Staff Union, SAR, requested the Commissioner-General to review and reconsider the decision in the Transmittal Memorandum No. 58.

On 4 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB) "on behalf of all staff members in SAR".

On 5 January 1995, the Director of UNRWA Affairs, SAR, informed the Applicant that his appeal to the JAB would be treated by the Agency on an individual basis, pursuant to area staff regulation 11.1(A). He explained, inter alia, that under the area staff pay policy issued on 21 August 1990, salary increases depend on the availability of funds.

The JAB adopted its report on 1 November 1995. Its evaluation and recommendations read, in part, as follows:

"...

C. The Board noted that the results of the salary survey conducted in SAR in 1994, i.e. the report of the survey team containing their recommendation and also the recommendation of the Administration and Management Committee on this subject as submitted to the Commissioner-General, are not in the file. The Board was convinced that these documents are necessary in assessing this case and, therefore, requested access to them.

The Board also raised inquiries to the Administration about the results of the salary surveys that were conducted in the Fields in 1994, and the way

available funds were allocated between those fields for purposes of salary increases in 1994, i.e. in conformity with the relevant provisions of the pay policy.

The Administration failed to provide the Board with all advisory material contained in the report of the salary survey team as well as the recommendation of the Administration and Management Committee. It also did not provide the Board with the amount of available funds for salary increases in 1994 and the exact way those funds were allocated between the different Fields.

The Board here records and indeed stresses that these documents and information should have been made available to the Board to enable it to perform its advisory role as provided for in the Area Staff Rules and to submit its recommendation to the Commissioner-General.

D. In the absence of the above vital information, the Board had no recourse but to depend on the available documents and other Agency publicized relevant material that could shed light on this issue, and concluded the following:

...

... the Board established that the SAR staff were at a disadvantage varying from 7.5% (for Grade 1) to 20.5% (for Grade 16) by comparison to the previous relationship with the Comparator prior to the increase. In other words, the purchase power of the take home pay has been diminished accordingly.

In this context, the Board believes that the salary increase given to the SAR Field effective 1 October 1994 was not proportional to the increase in the cost of living.

(ii) The salary increase was more to the disadvantage of the higher grades. Hence, the Board contests the Administration's argument that, after the increase, the SAR salary scale remained favourably comparable with that of the Government (the Comparator), which may be correct in absolute figures, but when compared with the Comparator's 30% increase across the board and with the relationship that existed, prior to the increase, between the UNRWA scale and that of the Comparator, this 'comparative favourability' claimed by the Administration, is materially reduced by 7.5% to 20.5% as established above.

(iii) The salary scale in SAR Field suffered a compression of about 7.4% after the increase by comparison to the previous scale which caused a material distortion to the relationship between the applied remuneration and the given responsibilities for classified posts. In other words, the responsibilities remained the same but the relevant remunerational differences between them narrowed.

(iv) In addition to the above, the SAR salary scale after the October 1994 increase converted to US dollar is the lowest among the Fields, despite the facts that:

a. the International Staff salary scale in SAR is the highest among the Fields,

b. the post adjustment multiplier in SAR as established by the United Nations is the highest among the Fields and comes second after Austria, and

c. the TSA rates in SAR are the second highest among the Fields.

E. Based on the above, and in view of the Administration's failure to provide the Board with the requested information, the Board resolved that there are material indications which suggest that something went wrong with the SAR salary scale after the increase, and that the Area Staff Pay Policy has not been fully complied with.

IV. RECOMMENDATION

In view of the foregoing, the Board unanimously makes its recommendation that the decision to increase SAR salaries effective 1 October 1994 by 12% for Grades 1-13 and 5% for Grades 14-20, be reviewed."

On 20 December 1995, the Officer-in-Charge, Headquarters, announced in Transmittal Memorandum No. 64 (Cod.A/59/Rev.25/Amend.56), to all staff subject to Area Staff Regulations and Rules, that area staff salaries for SAR would be increased by 15% across the board with effect from 1 January 1996, over and above the increases already granted in October 1994.

On 24 January 1996, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "...
>
> You will note that the Board has recommended that the decision to increase salaries in the SAR Field, effective 1 October 1994, be reviewed. However, the Board did not have all the material which it felt necessary to enable it to perform its advisory role; therefore, the Board'.. recommendation was not based on all the relevant documentation. In view of the above, I have decided exceptionally that your appeal should be referred back to the Board, together with the documentation which the Board requested, so that the Board can make a recommendation based on the full record. Since both parties may have additional comments to make, they should be given the opportunity to make additional submissions for consideration by the Board, in accordance with any procedural requirements set by [the] Secretary, Area Staff Joint Appeals Board.
>
> ..."

A newly constituted JAB adopted its report on 7 October 1996. Its evaluation and recommendation read as follows:

> "...
>
> C. The Board had access to the results of the salary survey conducted in SAR in 1994 except the report of the survey team containing its recommendation on this subject, [where] OIC, DAHR in his IOM explained that '[i]t is not possible to make available the advisory material contained in such documents as the recommendations of the AMC, as this is internal documentation consisting of the advice of staff organs to the Commissioner-General'.
>
> The Board also had access to the results of the salary surveys that were conducted in the Fields in 1994, and the way available funds were allocated between those Fields for purposes of salary increases in 1994.
>
> D. By reference to DAHR's letter of 27 June 1994, addressed to the Chairman, Administration and Management Committee, the Board noted that DAHR

recognized under item 2 entitled Findings paragraph (b) 'The analysis also indicates that the comparator's net income moved up by about 20% to 26% due to the across the board increase of 30% in the base salaries and the related increase in allowances', the across the board increase by the comparator was effective 1 May 1994.

IV. RECOMMENDATION

In view of the foregoing, the Board unanimously makes its recommendation that the decision appealed against be reviewed and that the 12% and the 5% which were increased effective 1 October 1994 be applied in a retroactive date which is 1 May 1994 and that the 15% that were increased across the board in 1 January 1996 be applied also in a retroactive way to match the effective date of the comparator which is 1 May 1994."

On 12 November 1996, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... The Board noted that the comparator's salary increases were effective 1 May 1994 and that the increase in the comparator's net income was about 20% to 26%. The Board recommended that the administrative decision be reviewed and that 1 October 1994 salary increases be backdated to 1 May 1994 and further that the 1 January 1996 salary increase (of 15% for all Area staff members in SAR) be also backdated to 1 May 1994.

I have carefully reviewed the Board's report and noted its conclusions. The matter at issue was whether the Agency correctly applied its pay policy. This required an analysis of the policy, including the overriding qualification of '*available funds*'. By contrast, the Board, having noted that the Area Staff in SAR had not received simultaneous and identical salary increases to those of employees of the comparator, made recommendations to alleviate that situation. I cannot accept the recommendations of the Board because they are not the result of an application of the facts of this case to the Agency's pay policy. Accordingly, your appeal is dismissed.

..."

On 17 February 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The salary increase of 12% that had been applied to grades 1-13 with effect from 1 October 1994 should be applied across the board, retroactive to 1 May 1994, i.e., the effective date of the comparator salary increase. The 15% increase effective 1 January 1996 should also be applied retroactively to 1 May 1994. The decision to increase the salaries of area staff grades 1-13 only 12% and grades 14-20 only 5% was arbitrary. The area staff in SAR have the lowest salaries of any of the area staff in other fields, despite the similar economic conditions under which area staff in all UNRWA fields live.

2. The Applicant properly appeals on behalf of other staff members because, at the time of the initial appeal, he was the elected chairman of the Area Staff Union, and he has been expressly authorized by the area staff to make this application.

Whereas the Respondent's principal contentions are:

1. The Applicant has no standing to make an application on behalf of others.

2. The Applicant has failed to show that the administrative decision that he challenges is procedurally defective or vitiated by bias or prejudice.

3. The salary increase was in accordance with the Agency's Pay Policy, and the Agency properly and fairly discharged its duties to the area staff of SAR, including the Applicant, under that Pay Policy. Prior to introducing the salary increase, the Agency had conducted a survey to compare the UNRWA salaries to those of the comparator and had taken into account the availability of funds, in accordance with the Pay Policy.

The Tribunal, having deliberated from 8 July to 3 August 1998 in Geneva, and from 6 to 20 November 1998 in New York, now pronounces the following judgement:

I. The Applicant presented his application on behalf of all members of the Area Staff Union (ASU), SAR. The Respondent contests the receivability of this application on the grounds that the Tribunal's Statute does not permit a representative action to be brought by one member on behalf of others, citing paragraph 2 of article 2 of the Statute, but noting, however, that persons whose right might be affected by a judgement of the Tribunal are permitted to intervene under the Tribunal's statute.

II. Article 2 of the Tribunal's Statute reads:

> "1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. ..."

In the first case brought before the Tribunal, (cases 1 to 15: *Aubert and 14 others and Intervention No. 1: Hall*), a staff member filed an application for intervention on behalf of the Staff Committee. Disallowing such intervention, the Tribunal applied a reasoning, the terms of which are entirely pertinent in the present case:

> "The applicant for intervention invokes her right to represent the interests of staff members of the United Nations who hold permanent contracts and who, according to the applicant for intervention, would be entitled to submit individual and separate applications for intervention;
>
> Whereas the competence of the Tribunal is defined strictly by the terms of its Statute as approved by the General Assembly of the United Nations;
>
> The Tribunal is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members (article 2, paragraph 1, of the Statute);
>
> ...

Whereas the terms of article 2, paragraph 2, state explicitly that the Tribunal is only open to 'any staff member' of the Secretariat of the United Nations or to 'any other person' [who can show that he is entitled to rights under any contract or terms of appointment], and the Staff Association cannot, by its very nature, be deemed to be covered by this provision."

III. The Tribunal, therefore, will not receive the application as a class action, and receives the application as if made only on behalf of the Applicant. It must do so in order to consider the merits of this application. If the Tribunal were to find in the Applicant's favour, the Commissioner-General could extend the terms of the judgement to other staff members.

IV. Addressing the substance of the case, the Tribunal remarks that the area staff Pay Policy Statement issued by UNRWA in 1990 plays an essential role in this matter. This policy is relied on by the Respondent and not contested by the Applicant. According to the Pay Policy Statement, "the Agency will conduct regular reviews of area staff pay in conjunction with comparator(s) pay and decide on adjustments required, if any. Adjustments in any given year for all Fields and Headquarters will be made at the same time, normally in the second half of the fiscal year." (Emphasis added)

Paragraph 4 of that Pay Policy Statement reads, in relevant part, as follows:

"In determining how *available funds* will be allocated between fields during these salary surveys, the Agency will take into account:

(A) The relationship between UNRWA pay and that of the comparator(s), [as defined in 5 below] through salary surveys ...;

..." (Emphasis added)

V. Salaries, then, are fixed and adjusted according to the level of salaries paid by the comparator to its employees, in this case the Syrian government. If surveys show that in comparison to UN salary level is inferior to that of the comparator, available funds must be

allocated to the different fields in order to increase salaries where necessary so that salaries paid in each UN field and their comparator are equal. In fact, it seems that UN levels usually compare favourably with the comparator's levels.

VI. The Syrian Government (comparator) increased its salaries by 30 per cent across the board, effective 1 May 1994. As a result of a salary survey conducted in the various duty stations in 1994, the Acting Chairman, Administration and Management Committee sent a report to the Commissioner-General. By then, the Syrian Government had already made the increase effective, and increases were anticipated in Jordan, Vienna, and Lebanon.

The Comptroller reported that funds were insufficient to cover any of the two scenarios proposed by DAHR (that either US$ 12 million or US$ 10 million be identified to cover a possible salary increase). It was accepted that, due to financial constraints, a recommendation would be issued to the Commissioner-General concerning the overall financial framework in which the pay policy would be implemented. Changes in the fields would then be taken into account within that framework. It was also understood that such increases "would have to be linked to cuts in expenditure elsewhere in the budget."

VII. On these grounds, a new memorandum from the Acting Chairman, AMC, to the Commissioner-General recommended that the amount devoted to expected salary increases in all the five Fields of UNRWA would reach a ceiling of $7,500,000. "Distribution of that amount would be based on proposals from DAHR following official governmental decrees raising comparator incomes. AMC agreed to recommend a salary increase for area staff in the Syrian Arab Republic of 20 per cent, with effect from 1 September 1994."

VIII. The Commissioner-General decided not to follow that recommendation. Instead, he granted an increase of 12 per cent to area staff, grades 1 to 13, and of 5 per cent to area staff, grades 14 to 20, with effect from 1 October 1994. On 1 January 1996, however, an

across-the-board increase of 15 per cent was given to area staff in SAR "on the basis of the results of the last comprehensive survey of Area staff salaries and benefits in relation to the comparator's salaries and benefits conducted in Syria ..."

IX. The case was examined by two different panels of the JAB. The first one recommended that the decision relative to the salary increases be "reviewed", based, in part, on the following:

> "On 1 October 1994, i.e. after the increase, UNRWA salary scale as a percentage of the comparator varied from 133 per cent (for grade 1, step 1) to 241 per cent (for grade 16, step 1).
>
> Based on the above, the Board established that the SAR staff were at a disadvantage varying from 7.5 per cent (for grade 1) to 20.5 per cent (for grade 16) by comparison to the previous relationship with the comparator prior to the increase. In other words, the purchase power of the take home pay has been diminished accordingly."

X. The JAB complained, however, that "the results of the salary survey conducted in SAR in 1994, i.e. the report of the survey team containing their recommendation and also the recommendation of the Administration and Management Committee on this subject as submitted to the Commissioner-General, were not in the file. The Board was convinced that these documents are necessary in assessing this case, and therefore requested access to them." The Commissioner-General convoked a new panel and provided it with the requested materials. This new Panel recommended that the Commissioner-General's decision be reviewed.

XI. Nowhere in the JAB's opinion or in the Applicant's contentions is it demonstrated that the relationship with the comparator is unfavourable to the UNRWA salaries; the assertion by the Respondent that that relationship *was still favourable to UNRWA* is nowhere contradicted. The JAB found that the relationship between UNRWA salaries and

those of the comparator remain favourable to UNRWA, even though in the past such relationship had been more favourable. It is to be noted that the Pay Policy Statement of 1990, requires only that area staff salaries compare favourably with those of comparator, without specifying the extent.

XII. The Tribunal carefully examined the Pay Policy Statement. It reached the conclusion that from the "available funds", the Commissioner-General has discretion in distributing the amounts among the different fields, provided that UNRWA salary levels have been compared to those of the comparator through salary surveys.

XIII. The Tribunal put questions to the Respondent concerning the exact meaning of "available funds". In his response dated 1 October 1998, the Respondent explained that:

> "For each biennium, UNRWA prepares a budget based on the needs of the Palestine refugee population, taking into account demographic growth, and needs arising from new developments. The budget is submitted to the General Assembly and thereafter the Commissioner-General has authority to incur expenditures to the extent that funds are available.
>
> ... The priority or 'core' items in the budget are those most directly related to the services provided to the Palestine refugees. Thus, funds are first allocated to the costs of the Agency's programmes in health, education, relief and social services, of which more than two thirds of UNRWA's funds are used for salaries of the Agency's 22,000 Area staff members.
>
> One non-core budget item is the 'Salary Reserve' for the anticipated costs of salary increases. As at 18 May 1994, as the result of salary increases granted to other Fields in 1993, but effective from 1 January 1994, the funded portion of the Salary Reserve for 1994 showed a deficit of USD 1,525,785. The amount of USD 7,766,000 in the Salary Reserve was unfunded. These figures are taken from paragraph 17 of a paper submitted to UNRWA's General Cabinet meeting on 30 and 31 May 1994 by DAHR (...). The Respondent also provides the Tribunal with extracts from the Cabinet minutes concerning the Agency's financial position at that time (a deficit for 1994 of USD 43,000,000) and discussion concerning the Salary Reserve (...)."

XIV. Obviously, it was in the Commissioner-General's power to decide on the budget cuts which he considered necessary in order that certain priorities be followed. The figures which were proposed for budget cuts (US$ 12 million, then US$ 10 million) were cut down to US$ 7.5 million. Those were the "available funds", once other necessities were taken into account by the Commissioner-General. The Applicant never proved that available funds existed to pay for the increases he was requesting.

XV. The Tribunal finds that, by allocating the available funds among the different fields, the Commissioner-General was acting within the parameters fixed by the Pay Policy Statement of 1990. If the powers of the Commissioner-General need to be curtailed, a new and different pay policy should be issued. The Tribunal may consider whether any improper motive or discrimination was behind the decisions taken by the Respondent regarding the allocation of funds that would render those decisions invalid. In the present case, however, no evidence was produced in that respect.

XVI. The claim is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary